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93-915

NO. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES LADWIG,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY

Respondent.

Petition for Writ of Certiorari to the Commonwealth of Kentucky Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

W. Robert Lotz
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120 West Fifth Street
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(606) 491-2206

38 pp

I.

QUESTION PRESENTED

1. Whether a valid waiver of a criminal defendant's right to trial by jury for a nonpetty offense under the sixth amendment to the United States Constitution can be inferred from a silent record if the defendant was represented by counsel and did not affirmatively request a jury before trial to the bench?

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COMMONWEALTH OF KENTUCKY

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Ladwig, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth of Kentucky Kenton Circuit Court entered in this case on January 28, 1993.

REFERENCES TO OPINIONS BELOW

The opinion of the Commonwealth of Kentucky Kenton Circuit Court dated January 28, 1993, is unreported and appears in the appendix at page 1a.

JURISDICTIONAL STATEMENT

The judgment of the Commonwealth of Kentucky Kenton Circuit Court was entered on January 28, 1993. The order of the Commonwealth of Kentucky Court of Appeals denying discretionary review was entered on April 8, 1993. (App., page 6a). The order of the Kentucky Supreme Court also denying discretionary review on this judgment was entered on August 25, 1993. (App., page 7a). This Petition for Writ of Certiorari was filed within 90 days of this latter date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial by, an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

priviliges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY STATUTORY PROVISIONS AND PROCEDURAL RULES

Kentucky Rule of Criminal Procedure 9.26(1):

Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the Commonwealth.

KRS 29A.270(1):

Defendants shall have the right to a jury trial in all criminal prosecutions, including prosecutions for violations of

traffic laws, in the circuit and district Courts. The defendant may request a jury trial at any time prior to the time his case is called for trial. KY. REV. STAT. ANN. §29A.270(1) (Michie/Bobbs-Merrill 1992).

STATEMENT OF THE CASE

The Petitioner, Charles Ladwig, was charged in a private criminal complaint with the offenses of Assault in the 4th Degree, KY. REV. STAT. ANN. § 508.030 (Michie/Bobbs-Merrill 1988), and Terroristic Threatening, Id. at §508.080. Both offenses are Class A Misdemeanors. A Kentucky Class A Misdemeanor carries a maximum sentence of 12 months in jail. Id. at §532.090(1).

On January 29, 1992, the Petitioner, with retained counsel Bernard Blau, was arraigned before the Hon. James Godsey, Commonwealth of Kentucky Kenton District Court. On February 5, 1992, an Order was entered appointing C. Donald Wells to preside as Special Judge in the case and scheduling the matter for trial on March 4, 1992, at 10:00 a.m. On March 4, 1992, the case was sent to pretrial services for Mediation. On

August 9, 1992, an Order was entered setting the matter for trial before the Court on Thursday, September 24, 1992, in Falmouth, Kentucky.

On September 24, 1992, and September 25, 1992, the case was tried to the Hon. C. Donald Wells without a jury. Petitioner was represented by retained counsel who answered "thats correct" when the Court asked if the defendant was ready for trial. The Petitioner was acquitted of Terroristic Threatening, and convicted of Assault in the Fourth Degree.

On November 10, 1992, and November 13, 1992, the case was called for sentencing hearing. The Court found that there was no record of any prior conviction of the Defendant and sentenced him to 100 days in jail, $500.00 fine and costs. The Court entered a conditional discharge and

probation Order, ordering the Petitioner to spend 84 hours in jail, to do 50 hours of Community Service for a Governmental Agency, to be on supervised probation for 3 months, to pay costs of supervision, to pay $17.50 per day for the four days in jail, and to initiate no contact or communication with the complainant.

Counsel on Appeal and for Certiorari has reviewed the record in the case consisting of the filings in the District Court, and the tape recorded Record of Proceedings of January 29, 1992, March 4, 1992, September 24, 1992 and September 25, 1992 and represents that the record is completely silent and fails to reveal any of the following:

1. A Waiver of his right to trial by jury by the Petitioner, Charles Ladwig, written or oral.

2. A Waiver of his right to trial by jury by counsel for the Petitioner,

Charles Ladwig, written or oral.

3. A Waiver of trial by jury by counsel for the Commonwealth of Kentucky, written or oral.

4. An Approval by the Commonwealth of Kentucky District Court of the Waiver of trial by jury, written or oral.

5. Any evidence that the Petitioner was advised or addressed by the Court regarding his right to trial by jury at any stage of the proceedings.

Direct appeal of the Defendant's judgment of conviction was timely made to the Kenton Circuit Court. The statement on Appeal presented the following argument:

> The defendant's conviction must be reversed because the record fails to reveal that a knowing and voluntary waiver of the right to trial by jury was ever made by the defendant or by the Commonwealth or approved by the Court.

Federal Constitutional authority cited included the United States Constitution Amendment VI, Amendment XIV; Baldwin v. New York, 399 U.S. 66 (1970); Boykin v. Alabama, 295 U.S. 238 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Johnson v. Zerbst, 304 U.S. 438 (1938); Patton v. United States, 281 U.S. 276 (1930).

The Kenton Circuit Court's judgment affirming the District Court's decision and denying Petitioner's aforementioned ground on appeal stated in pertinent part:

> The ... [Petitioner] was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the ... [Petitioner's] concurrence, he was tried by the Court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage.

The Petitioner then moved the Commonwealth of Kentucky Court of Appeals for discretionary review of the Circuit Court's judgment. The Court of Appeals denied discretionary review in an order dated April 8, 1993. (App., page 6a). After being denied discretionary review by the Court of Appeals, Petitioner then moved the Kentucky Supreme Court for discretionary review of the Circuit Court's judgment. The Kentucky Supreme Court denied discretionary review in an order dated August 25, 1993. (App., page 7a).

REASON FOR GRANTING THE WRIT

I. The Commonwealth of Kentucky Circuit Court decision on direct appeal holding that a defendant represented by counsel in a nonpetty criminal case had the affirmative burden to request a jury trial and inferring waiver of the Federal Jury Trial Right from a silent record conflicts directly with applicable U.S. Supreme Court Law which sets forth minimum conditions precedent to a valid waiver of this important Federal right, in particular, waiver must be of record, preferably in writing, and it must be voluntary, knowing, and intelligent.

The Federal Constitutional right to trial by jury under the VI & XIV Amendments of the United States Constitution applies to all criminal prosecutions for offenses which carry a maximum penalty of confinement of more

than six months or death. Baldwin v. New York, 399 U.S. 66, 69 (1970). Duncan v. Louisiana, 391 U.S. 145, 159 (1968). This fundamental right is applicable to the charge of Assault in the 4th Degree, KY. REV. STAT. ANN. §508.030 (Michie/Bobbs-Merrill 1992), a Class A Misdemeanor carrying a maximum sentence of 12 months in jail.

Under federal constitutional law, a waiver of a federal constitutional right is not valid under the Due Process Clause unless it is "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

When a Defendant is waiving his or her Federal Constitutional right to trial by jury, four conditions must be met before a valid waiver in a criminal case becomes effective: first, the waiver must be in writing; second, the government

attorney must consent to the waiver; third, the trial court must approve the waiver; and fourth, Defendant's waiver must be voluntary, knowing, and intelligent. See Patton vs. United States, 281 U.S. 276, 312-13 (1930); Singer v. United States, 380 U.S. 24, 31 (1965); Adams v. United States ex rel McCann, 317 U.S. 269, 275 (1943). See also United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983).

Perhaps the most important language in the Patton opinion deals with the fourth condition of a voluntary, knowing, and intelligent waiver of a Federal Constitutional right to trial by jury:

> Before any waiver of the right of one charged with crime to trial by jury can become effective, the consent of government counsel, and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant; and the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised

> discretion, with an eye to avoid unreasonable or undue departures from that mode of trial, or from any essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. Patton v.Unites States, 28 U.S. 276, 312-13 (1930).

Several U.S. Supreme Court Opinions have affirmed Patton in holding that waiver of important Federal Constitutional rights, including the right to trial by jury, cannot be presumed from a silent record, especially to establish the fourth condition of a voluntary, knowing, and intelligent waiver.

Boykin v. Alabama involved a direct appeal from a conviction based upon a guilty plea where the record was silent on its face as to waiver of the Federal Constitutional right to trial by jury. 295 U.S. 238, 242 (1969). Boykin approved the procedure of direct appeal of such convictions and held that the

waiver of a defendant's right to trial by jury, as one of three important Federal Rights, cannot be presumed from a silent record. Id. at 243. The Court further held that it was plain error for a trial judge to enter a judgment based upon a guilty plea without an affirmative showing that the waiver of jury trial was intelligently and voluntarily made. Id. at 242. Boykin established a requirement that the prosecution must spread upon the record of the case evidence of a valid waiver of federal constitutional rights. See Park v. Raley 61 U.S.L.W 4007, ____ (1992), McCarthy v. United States, 394 U.S. 459, 466 (1969).

Carnley vs. Cochran concerned the waiver of the Federal Constitutional right to counsel. 369 U.S. 506, 516 (1962). This Court held: "presuming a waiver from a silent record is impermissible. The record must show, or

there must be an allegation which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer." Id. at 516.

The Kentucky Circuit Court decision which held that the failure of Charles Ladwig or his counsel to request a jury trial, standing alone, constituted a valid waiver of that right, reflects Kentucky doctrine set forth in Brown v. Hoblitzel, 307 S.W.2d 739 (Ky. 1957); Williams v. Pierson, 191 S.W.2d 574 (Ky. 1945), and codified in Ky. Rev. Stat. 29.A.270(1). Although Kentucky R Cr 9.26(1) and later decisions in Short v. Commonwealth, 519 S.W.2d 828 (Ky. 1975) and Crane v. Commonwealth, 680 S.W.2d 138 (Ky. Ct. Apps. 1984), appear to mandate adherence to Federal Constitutional requirements for a valid waiver, these requirements continue to be ignored in practice by the District Courts. The

Kentucky District Judge's Benchbook setting forth misdemeanor arraignment procedure does not require advice to the defendant of jury trial right or how to assert it, nor any procedure for obtaining jury trial waivers before proceeding to bench trials. (App., page 10a). In Kenton County the Court Standard Form requires filing by a Defendant of a written motion for jury trial before one is granted. (App., page 8a).

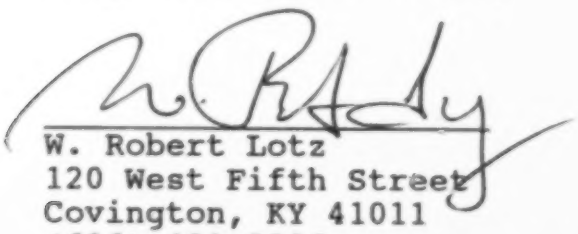
Because of these procedures, which continue to exist, Charles Ladwig was tried, convicted and sentenced to jail by a judge for a nonpetty offense without an oral or written waiver of jury trial by himself, his attorney, the prosecutor, or the Court ever appearing of record. There is not even a record of the jury trial right ever being discussed or explained to him.

CONCLUSION

The total omission by the Kentucky trial court of adherence to Constitutionally mandated procedure for obtaining and approving a waiver of this defendant's right to trial by jury requires reversal of his conviction on direct appeal as a matter of important Federal Constitutional Law. The issue of "silent waivers" has not been clearly addressed under State Law or Federal Law by the Kentucky Court of Appeals or by the Kentucky Supreme Court. Both of these Courts have declined discretitionary review in this case and thereby continue to allow Kentucky District Courts to reduce jury trial calenders by practicing their game of "Don't Tell - Don't Ask". For these

reasons a writ of certiorari should be issued to review the judgment of the Kenton County, Kentucky Circuit Court.

Respectfully submitted,



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FILE STAMPED:
ENTERED KENTON CIRCUIT COURT:
JANUARY 28, 1993

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
THIRD DIVISION

CASE NO. 92-XX-00048

CHARLES LADWIG **APPELLANT**

VS.

COMMONWEALTH OF KENTUCKY **APPELLEE**

APPEAL FROM KENTON DISTRICT COURT
HON. C. DONALD WELLS, SPECIAL JUDGE
CASE NO. 92-M-00142

ORDER AND OPINION AFFIRMING

This is a criminal appeal filed by Charles Ladwig, Defendant below, from a Judgment and Sentence of the Kenton District Court entered November 13, 1992, which found him guilty of violating KRS 508.030, Assault in the Fourth Degree, and which sentenced him

to 100 days in jail and a $500.00 fine. The 96 days in jail were probated and he was ordered to spend 84 hours in jail, and to perform 50 hours of community service, and he was placed on probation for two (2) years, supervised for three (3) months, to pay the costs of supervision, and to pay $17.50 per day for the four (4) days in jail, and to initiate no contact or communication with Mark Modlin.

1. Appellant's first ground on appeal is that the record does not contain a knowing and voluntary waiver of the right to a trial by jury by the Appellant. That RCr 9.26 (1) and KRS 29A.270 (1) require a jury trial in the Appellant's case. That since the Appellant was not tried by a jury, and

since he did not waive his right to a jury trial, this case should be remanded for a jury trial.

RCr 9.26 (1) states that cases required to be tried by a jury shall be so tried unless waived.

KRS 29A.270 (1) states that defendants shall have the right to a jury trial in all criminal prosecutions, in circuit and district court. The defendant may request a jury trial at any time prior to the time his case is called for trial.

The Appellant was represented by an attorney at all stages of these proceedings. He never requested a jury trial. He announced ready for trial at the call of his case for trial. With the Appellant's concurrence, he was

tried by the Court and was found guilty. He cannot complain because the results of the bench trial were not to his advantage.

2. Appellant's next ground of appeal is that the evidence presented at his trial was insufficient to support a finding that he intended to cause physical injury to Mark Modlin, which is an essential element of Assault in the Fourth Degree.

The evidence heard by the Trial Court was sufficient to support the conviction by a finding that the Appellant caused physical injury to the victim.

3. Appellant's final ground of appeal is that the Trial Court erred in overruling Appellant's request to

participate in the Kenton County Diversion Program.

According to the rules of the Program, the Appellant was not eligible to participate therein.

ORDER

IT IS, THEREFORE, ORDERED by the Court that the Judgment of the Kenton District Court is affirmed.

January 28, 1993.

/s/ Daniel J. Goodenough
DANIEL J. GOODENOUGH, JUDGE
KENTON CIRCUIT COURT
THIRD DIVISION

cc: Hon. Stephen P. Huddleston,
Special Prosecutor
Hon. Robert Lotz,
For Appellant
Hon. C. Donald Wells,
Special Judge
Kenton District Court Clerk

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

93-CA-517-D

CHARLES LADWIG — MOVANT

V. — ON MOTION FOR DISCRETIONARY REVIEW FROM KENTON CIRCUIT COURT ACTION NO. 92-X-48

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * * * *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: LESTER, Chief Judge; EMBERTON and WILHOIT, Judges

Having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby DENIED.

ENTERED: April 8, 1993

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

93-SC-307-D
(93-CA-517-D)

CHARLES LADWIG **MOVANT**

V. **KENTON CIRCUIT COURT**
92-X-48

COMMONWEALTH OF KENTUCKY **RESPONDENT**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 25, 1993

/s/ Robert F. Stephens
CHIEF JUSTICE

_____ **DIVISION**

CASE NUMBER _____

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS

DEFENDANT

MOTION FOR JURY TRIAL

COMES NOW THE DEFENDANT, BY AND THROUGH COUNSEL, AND RESPECTFULLY MOVES THIS COURT FOR A TRIAL BY JURY IN THE AFOREMENTIONED MATTER.

_____

ATTORNEY FOR THE DEFENDANT

NOTICE

PLEASE TAKE NOTICE THAT THIS MATTER WILL BE ON FOR HEARING AT THE COURT'S CONVENIENCE.

_____

CERTIFICATION

I, HEREBY CERTIFY THAT I HAVE SENT A TRUE COPY OF THE JURY DEMAND AND NOTICE TO HON. JON ELFERS, COUNTY ATTORNEY, 3RD FLOOR, COUNTY BLDG., COV., KY, THIS THE _____ DAY OF _____, 19_____.

1.15 INITIAL APPEARANCE OF DEFENDANT CHARGED WITH A MISDEMEANOR OR VIOLATION OFFENSE [1]

1. Ask the defendant:

   a. name

   b. address

   c. date of birth

2. Advise the defendant:

   a. of the charge against him/her (RCr 3.05)

   b. of right to remain silent (RCr 3.05)

   c. that any statement made by him/her may be used against them (RCr 3.05)

   d. that defendant has a right to a trial (RCr 3.05)

   e. of defendant's right to have counsel (RCr 3.05)

---

1. KENTUCKY DISTRICT JUDGES BENCHBOOK, Published by AAAA Administrative Office of the Courts, Frankfort, Kentucky. Revised December 1, 1989.

3. Determine whether the charge equires that defendant has he assistance of counsel:

a. if the offense is punishable by a fine in excess of $500 or by confinement (KRS 31.100(4)(b)), defendant must be advised of right to appointed counsel if defendant is a "needy person" (KRS 31.110). A "needy person" means a person who is unable to provide for the payment of an attorney and all other necessary expenses of representation. KRS 31.100(3). NOTE: Concerning the appointment of counsel, see 1.20.

b. appoint counsel where appropriate.

4. Ask the defendant how he/she intends to plead:

   a. if guilty, proceed to section on Guilty Pleas, 1.25.

   b. if not guilty, set a trial date. Defendant must be given opportunity to consult counsel. (RCr 3.07, 3.05, 9.02).

5. Review Conditions of Release if defendant remains in custody (RCr 3.05).